HSBC BANK MALAYSIA BERHAD

v.

LH TIMBER PRODUCTS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-3105-1999]
28 SEPTEMBER 2005

HIRE PURCHASE: *Breach of terms - Action to recover debt - Admission by defendants - Summary judgment - "Without prejudice" correspondences - Whether goods fall under Hire-Purchase Act - Duty to mitigate losses - Whether late interest charges amounted to penalty.*

The plaintiff executed three letters of offer and 42 Hire-Purchase agreements with the first defendant ("said agreements") to finance the purchase of various equipments, machines and forklift trucks ("said goods") wherein the second to the sixth defendants were guarantors under the said aggreements *vide* three guarantees and indemnities ("guarantee").

The first defendant breached the said aggreements by defaulting on its monthly hire purchase rentals and late charges which culminated in the plaintiff terminating the said ggreements *vide* a letter of demand dated 27 August 1999.

The amount owing by the defendants to the plaintiff as at 12 August 1999 was RM5,020,294.29 plus interest and this amount was not disputed by the defendants at any material time.

The plaintiff filed a summary judgment application under O. 14 Rules of the High Court 1980 claiming for the debt under the said agreements *vide* encl. 5, which said application was dismissed by the learned senior assistant registrar ("decision"). This case is the appeal filed by the plaintiff against the decision aforesaid.

Issues:

a) Whether the defendants are liable and accountable under the guarantee;

b) Whether this is a case suitable for determination under O. 14 RHC;

c) What constitutes "without prejudice" correspondences

d) Whether the said goods fall under the ambit of the Hire-Purchase Act 1967 thus putting a responsibility on the plaintiff to mitigate their loss by repossessing the said goods; and

e) Whether the late interest charges amount to a penalty.

Held:

[1] A contract of guarantee is a contract whereby the surety or guarantor promises the creditor (plaintiff) to be responsible to the principal (first defendant) for the due performance by the principal of his existing or future obligations to the creditor in the event the principal fails to perform those obligations. The first defendant as the principal debtor had defaulted when it failed to pay the monthly hire rentals and late charges. That default on the part of the first defendant triggered the liability of the defendants as guarantors. As guarantors of the said agreement under the guarantee, the defendants must be held liable and accountable. (pp. 255 b & 256 h)

[2] Summary judgment applications are the most popular method adopted by legal practitioners to obtain speedy judgment without the necessity of a trial especially where the defendant's defence is unsustainable both in law and on the facts. Although there is no time limit as to when an application under O. 14 RHC should be made, it should be filed expeditiously but if there is a delay, the plaintiff must explain why it occurred. (p. 257 f-g)

[3] To challenge an O. 14 application, the defendant needs to show that there is a triable issue as to the facts. It is not sufficient for the defendant to merely raise facts which do not constitute a defence to the claim or deny his indebtedness. He has to go further and provide an explanation as to why he is not so indebted (*Whiteley*'s case). (pp. 257 h & 258 a-d)

[4] This appeal is unique in that it does not involve any dispute as to the facts. The defendants themselves have admitted that they were and are owing the plaintiff the sum of RM5,020,294.29 *vide* letters ("said letters") wherein they had appealed for a restructuring of the loan repayments. These letters are damning evidence against the defendants and in the face of such solid evidence, summary judgment should be given against the defendants in favour of the plaintiff and the appeal in encl. 10 should be allowed with costs. (pp. 258 g-h & 259 a)

[5] The said letters of admission as to amount owing by the defendants to the plaintiff constituted open letters or letters not based on a "without prejudice" basis. They did not carry the "without prejudice" labels and as such was not made on the basis of without prejudice *(Ted Bates* case). (p. 259 b-d)

[6] The said agreements were not caught under the Hire-Purchase Act 1967 and as such were subject to the terms and conditions of the said agreements which clearly stated that the plaintiff has no duty to discharge by repossessing the said goods. Consequently the issue of repossessing the said goods and mitigation does not arise at all. (pp. 261 c, h & 262 f)

[7] The defendants have not proven that the interests charged were excessive in nature or that it was never agreed upon. It must be borne in mind that by virtue of the said agreements, the plaintiff was and is entitled to charge late interest charges and consequently, it was not open to the defendants to raise an objection to the very idea that they had agreed upon. (p. 267 a, c)

Case(s) referred to:

Anglo-Italian Bank v. Wells [1878] 38 LT ***(refd)***
Associated Tractors Sdn Bhd v. PMB (Kulim) Sdn Bhd & Ors [1989] 1 MLJ 245 ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 SC ***(refd)***
Canadian Pacific Ry v. R [1931] AC 414 ***(refd)***
Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***
Citizens Bank of Louisiana v. First National Bank of New Orleans [1873] LR 6 HL 352 ***(refd)***
Clipper Maritime Ltd v. Shirlstar Container Transport Ltd ("The Anemone") [1987] 1 Lloyd's Rep 546 ***(refd)***
Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd [1993] 3 SLR 662 ***(refd)***
Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 2 MLJ 127 ***(dist)***
Dane v. Mortgage Ins Corpn [1894] 1 QB 54 CA ***(refd)***
Dawson's Bank Ltd v. Nippon Menkwa Kabushiki Kaisha [1935] LR 62 ***(refd)***
Dean v. Bruce [1952] 1 KB 11 ***(refd)***
Edward v. Davies [1888] 6 TLR 385 CA ***(refd)***
Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1988] 1 MLJ 188 ***(refd)***
Fahey v. MSD Spiers Ltd [1973] 2 NZLR 655 ***(refd)***
Farid Hussain & Ors v. United Asian Bank Berhad [1985] 2 MLJ 199 SC ***(refd)***
Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 ***(refd)***
Harburg India Rubber Comb Co v. Martin [1902] 1 KB 778 ***(refd)***
Helby v. Matthews [1895] AC 471 HL ***(refd)***

Hewison v. Ricketts [1894] 71 LT 191 ***(refd)***
Hong Leong Finance Berhad v. Lee Cheng Heng Earthworks & Anor [1987] 2 MLJ 266 ***(refd)***
Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1987] 1 MLJ 139 ***(refd)***
Jorden v. Money [1854] 5 HLC 185 ***(refd)***
Kabatasan Timber Extraction Co v. Chong Fah Shing [1969] 2 MLJ 6 ***(dist)***
Kai Nam v. Ma Kam Chan [1956] AC 358 ***(refd)***
Kesang Leasing Sdn Bhd v. Longwood Sdn Bhd & Ors [1988] 2 MLJ 328 ***(refd)***
Lee v. Butler [1893] 2 QB 318 CA ***(refd)***
Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings Sdn Bhd & Ors [1997] 4 CLJ 168 CA ***(refd)***
Lord Selborne in Lakeman v. Mountstephen [1874] LR 7 HL 17 ***(refd)***
Maddison v. Alderson [1883] 8 App Cas 467 ***(refd)***
Mallett v. Bateman [1865] LRICP 163 (Ex Ch) ***(refd)***
McLardy v. Slateum [1890] 24 QBD 504 ***(refd)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Nassau Steam Press v. Tyler [1894] 70 LT 376 ***(refd)***
National Company For Foreign Trade v. Kayu Ara Sdn Bhd [1984] 1 CLJ 283; [1984] 2 CLJ (Rep) 220 FC ***(refd)***
Neville v. Wilkinson [1782] 1 Bro CC 543 ***(refd)***
Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries Bhd [1989] 3 MLJ 246 ***(refd)***
Pickard v. Sears [1837] 6 Ad & E 469 ***(refd)***
Prodeal Sdn Bhd v. Kelimis Jaya Sdn Bhd [1999] 3 CLJ 409 HC ***(refd)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 CA ***(foll)***
Re General Rail Syndicate, Whiteley's Case [1900] 1 Ch 365 ***(refd)***
Re Rankin, Rankin v. Shiliday [1927] N1 162 CA ***(refd)***
Roberts v. Plant [1895] IQB 597 CA ***(refd)***
Robinson & Co v. Lynes [1894] 2 QB 577 ***(refd)***
Sabah Finance Berhad v. UMW (East Malaysia) Sdn Bhd [1991] 2 CLJ 1013 HC ***(refd)***
Sampson v. Burton [1820] 4 Moore CP 515, 129 ER 891 ***(refd)***
Simmons v. Rose [1862] 31 Beav 1 ***(refd)***
Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(refd)***
Supreme Leasing Sdn Bhd v. Lee Gee & Ors [1989] I MLJ 129 328 ***(refd)***
Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl [1979] 2 MLJ 257 FC ***(refd)***
Tengku Farid Tunku Hussain & Ors v. United Asian Bank Berhad [1985] 2 MLJ 199 SC ***(refd)***
Territorial and Auxiliary Forces Association of the County of London v. Nichols [1949] 1 KB 35 ***(refd)***
Tomlin v. Reid [1963] EGD 338 ***(refd)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***
Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***
Wardens and Commonalty of the Mystery of Mercers of the City of London v. New Hampshire Insurance Company [1991] 3 JIBFL 144 ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967 (Act 212), s. 1(2)
Rules of the High Court 1980, O. 14 r. 2

Other source(s) referred to:
De Colyar On Guarantees, 3rd edn, p 1
Equipment Leasing in Malaysia, Some Legal Aspects And Problems, Malayan Law Journal *vide* [1981] 1 MLJ X111, pp. XV to XVI
Halsbury's Laws of England, 4th edn, 1993 reissue, para 101
Halsbury's Laws of England, 4th edn, vol. 9, p, 382, para 554
Rowlatt On Principal And Surety, 2nd edn, pp 1, 8
Smith's Mercantile Law, 13th edn, p 546

For the plaintiff - Lai Kok Wai; M/s Nik Hussain & Partners
For the defendants - J Amardas; M/s KP Ng & Amardas

Reported by Sharmini Pillai

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

The plaintiff's claim against all the defendants was based on the hire purchase facilities granted by the plaintiff to the first defendant. The plaintiff had, on the application of the first defendant, entered into 42 hire purchase agreements ("the said agreements") with the first defendant following the execution of three letters of offers. The second defendant to the sixth defendant (hereinafter referred to as "the defendants") were the guarantors of the said agreements under the three guarantee and indemnity agreements ("the said guarantee and indemnity agreements").

The said agreements were divided into five groups. Under the first group known as "agreements I" by way of a letter of offer dated 30 January 1995 there were 15 hire purchase agreements and the said guarantee and indemnity agreements dated 27 February 1995 were signed by the second, third, and fourth defendants. Under the second group known as "agreements II" by way of a letter of offer dated 26 October 1995 there were three hire purchase agreements and the said guarantee and indemnity agreements dated 18 November 1995 were signed by the third, fifth and sixth defendants. Under the third group known as "agreements III" by way of a letter of offer dated 26 October 1995 there were (17) hire purchase agreements and the said guarantee and indemnity agreements dated 18 November 1995 were signed by the third, fifth and sixth defendants. Under the fourth group known as "agreements IV" by way of a letter of offer dated 26 September 1997 there

were five hire purchase agreements and the said guarantee and indemnity agreements dated 26 September 1997 were signed by the third and the sixth defendants. Finally, under the fifth group known as "agreements V" by way of a letter of offer dated 26 September 1997 there were two hire purchase agreements and the said guarantee and indemnity agreements dated 26 September 1997 were signed by the third and the sixth defendants.

All the said agreements as well as the said guarantee and indemnity agreements have been exhibited and they were quite voluminous.

So, based on the said agreements I, II, III, IV and V, the plaintiff had given the hire purchase facilities to the first defendant to finance the purchase of various equipments, machines and forklift trucks (hereinafter they will be referred collectively as "the said goods"). The first defendant had breached the said agreements I, II, III, IV and V for not paying the monthly hire rentals and the late charges. Following the breach by the first defendant, the plaintiff terminated the said agreements I, II, III, IV and V through the letters of demand dated 27 August 1999. Calculation wise, as at 12 August 1999, the defendants were owing the plaintiff the following sums:

Under the said agreements I
The sum of RM1,209,479.66 together with interest at the rate of 11.85% on the sum of RM1,184,727.75.

Under the said agreements II
The sum of RM99,982.29 together with interest at the rate of 11.85% on the sum of RM98,545.12.

Under the said agreements III
The sum of RM2,693,074.97 together with interest at the rate of 9.50% on the sum of RM337,527.71 and 9.75% on the sum of RM2,310,325.54.

Under the said agreements IV
The sum of RM383,580.02 together with interest at the rate of 12.26 % on the sum of RM159,786.45, and at the rate of 14.5% on the sum of RM172,235.88, and at the rate of 16.5% on the sum of RM44,287.80.

Under the said agreements V
The sum of RM634,177.35 together with interest at the rate of 11.25% on the sum of RM624,715.15.

It must be emphasised that the plaintiff's total claim against the defendants for all the said agreements came up to RM5,020,294.29 as at 12 August 1999 together with interests thereto. Mention must be made that the defendants have not at any material time disputed the amount owing.

What Is A Contract Of Guarantee?

One may perhaps ask this question. It is an interesting question in the context of the present appeal bearing in mind that the defendants were the guarantors of the said agreements and the first defendant was the hirer or the borrower of the hire purchase facilities advanced by the plaintiff who was the creditor.

Legally speaking, a contract of guarantee is a contract whereby the surety or the guarantor promises the creditor to be responsible to the principal for the due performance by the principal of his existing or future obligations to the creditor in the event the principal fails to perform those obligations. In the context of the present appeal, the creditor would refer to the plaintiff while the principal would refer to the first defendant. The surety or the guarantor would refer to the defendants.

Textbook writers and authors have explained the meaning to be attached to the word "guarantee". I can do no better than to reproduce them here. Phillips J. in *Wardens and Commonalty of the Mystery of Mercers of the City of London v. New Hampshire Insurance Company* [1991] 3 J.I.B.F.L. 144 cited with approval the definition of the word "guarantee" as set out in *Halsbury's Laws of England*, 4th edn, 1993 reissue at para. 101:

> A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be comtemplated.

A guarantee is defined in Fell's Treatise On the Law of *Mercantile Guaranties And Of Principal And Surety In General*, second edn, published in 1820, as follows:

> A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance.

De Colyar On Guarantees, third edn at p. 1, defines the word "guarantee" in this way:

> A guarantee is a collateral engagement to answer for the debt default or miscarriage of another person.

Rowlatt On Principal And Surety, second edn, at p. 1, defines the word "surety" in this way:

> … one who contracts with an actual or possible creditor of another to be responsible to him by way of security, in addition to that other, for the whole or part of the debt.

The word "guarantee" is also defined in *Smith's Mercantile Law*, 13th edn at p. 546 in this way:

> … a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.

Again, Rowlatt On Principal And Surety, second edn at p. 8 explains the meaning of the word "surety" in this way:

> … a person may become a surety as well by pledging, mortgaging or charging his property for the debt of another as by pledging his personal credit.

I gratefully adopt all these definitions in adjudicating the present appeal in encls. 10. One thing that is certain is this. That there cannot be a guarantor unless there is a principal debtor. Likewise here, the principal debtor was the first defendant and the guarantors were the defendants. In the words of *Lord Selborne in Lakeman v. Mountstephen* [1874] L.R. 7 H.L. 17 at 24:

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

It is important to note that the significant feature of a contract of guarantee is that the liability of the guarantor is always ancillary to that of the principal debtor and it is the principal debtor that remains primarily liable to the creditor (*Mallett v. Bateman* [1865] L.R.IC.P. 163 (Ex Ch); *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K.B. 778 at 784; *Fahey v. MSD Spiers Ltd* [1973] 2 N.Z.L.R. 655; and *Clipper Maritime Ltd v. Shirlstar Container Transport Ltd ("The Anemone")* [1987] 1 Lloyd's Rep 546 at 555). The liability of the guarantor arises when the principal debtor fails to perform his obligations to the creditor. So, unless and until the principal debtor has failed to perform his obligations under the contract to the creditor, there is no liability on the guarantor to pay. In *Sampson v. Burton* [1820] 4 Moore C.P. 515, 129 E.R. 891, it was held that a contract of guarantee was a contract to indemnify the creditor on the occurrence of a contingency, namely, the default of the principal debtor. In the context of the present appeal, the first defendant as the principal debtor has defaulted when it failed to pay the monthly hire rentals and the late charges. That default on the part of the first defendant triggered the liability of the defendants as guarantors. That would be the position of the law. As guarantors of the said agreements under the three guarantee and indemnity agreements, the defendants must be held liable and accountable. There are no two ways about it.

Summary Judgment Application By The Plaintiff

The plaintiff was entitled to file the summary judgment application in encl. 5 against the defendants. The learned senior assistant registrar ("SAR") dismissed the plaintiff's application for summary judgment and the plaintiff by way of encl. 10 appealed against that decision.

The defendants challenged the plaintiff's summary judgment application but the defendants saw it fit not to dispute their liabilities under the said agreements and under the said guarantee and indemnity agreements.

The law books are replete with authorities on summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC"). It is the most popular method adopted by legal practitioners to obtain speedy judgment without the necessity of a trial. It would certainly assist the plaintiff to dispose of an action where the defendant's defence is unsustainable both in law and on the facts. Apart from the saving of time, it is also costs effective. All it takes for the plaintiff to proceed under O. 14 of the RHC is to ensure:

(1) that the defendant has entered an appearance;

(2) that the statement of claim has been served on the defendant; and

(3) that the affidavit in support of the application has complied with the requirements of O. 14 r 2 of the RHC.

For a clearer exposition of the law, reference to the case of *National Company For Foreign Trade v. Kayu Ara Sdn Bhd* [1984] 1 CLJ 283; [1984] 2 CLJ (Rep) 220 FC is highly recommended.

There is no time limit as to when an application under O. 14 of the RHC should be made. Even after the defence has been filed, an O. 14 of the RHC could still be made provided it can be shown that the defence is a sham. Ideally, a summary judgment application should be filed expeditiously but if there is a delay the plaintiff has to explain why he had not applied sooner. The onus to explain that delay falls on the plaintiff (*McLardy v. Slateum* [1890] 24 QBD 504; and dutifully followed by *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at 268).

To challenge an O. 14 application, the defendant needs to show that there is a triable issue as to the facts. This is not an easy task. In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627 SC, the defendants who were sued for breach of a scholarship agreement alleged, *inter alia*, that the plaintiff was in breach of a condition of the agreement by providing the defendant with a post not commensurate with his qualifications and the court held that there was no triable issue and summary judgment was entered accordingly. It must be borne in mind that the defendant must raise an

arguable issue that requires a trial in order to determine it, once and for all (*Voo Min En & Ors. v. Leong Chung Fatt* [1982] 2 MLJ 241). Where the defendant in *Associated Tractors Sdn Bhd v. PMB (Kulim) Sdn Bhd & Ors* [1989] 1 MLJ 245 admitted in a letter as to the debt the court held that no reliance could be placed on the defendant's statement of defence which was filed ten months after the issuance of the letter of admission.

It is said that in opposing an application for summary judgment, it is not sufficient for the defendant to merely raise facts which do not constitute a defence to the claim. The defendant must do more than that. The defendant cannot assert a denial of indebtedness without providing proof thereof (*Wallingford v. Mutual Society* [1880] 5 App Cas 685 at 709; *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139; *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors.* [1988] 1 MLJ 188; *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397; and *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 CA). If the defendant says that he is not indebted to the plaintiff, the defendant has to provide an explanation as to why he is not so indebted. It is not enough for the defendant to merely deny his indebtedness (*Re General Rail Syndicate, Whiteley's* Case [1900] 1 Ch 365).

If there are some other reasons for a trial, the summary judgment application would be denied. In a situation where a triable issue could not be raised by the defendant but the court is satisfied that there are some circumstances that ought to be investigated, then summary judgment would not be entered against the defendant (*Miles v. Bull* [1968] 3 All ER 632 at 637).

These are some of the legal backdrops to consider in adjudicating the appeal in encl. 10. I shall revert to it at a later stage of this judgment.

The Facts Of The Case Are Clear In That The Defendants Had Admitted To The Amount Owing To The Plaintiff

I must categorically say that this appeal was unique - in that it did not involve any dispute as to the facts. That being so it was certainly suitable for summary judgment and I was rather surprised that the SAR had dismissed the plaintiff's application for summary judgment in encl. 5. The defendants themselves have admitted that they were and are owing to the plaintiff the sum of RM5,020,294.29. In a letter dated 28 October 1999 from the first defendant to the plaintiff, the defendants readily admitted owing to the plaintiff the sum of RM5,020,294.29 and appealed for re-structuring of the loan repayments. Again, letters from the first defendant dated 16 December 1999 and 24 December 1999 showed that the defendants admitted owing that sums. All these three letters of admissions by the first defendant were exhibited in the

relevant affidavits and they were certainly damning evidence against the defendants. In the face of such solid evidence, summary judgment should have been given against the defendants in favour of the plaintiff and the appeal in encl. 10 should be allowed with costs. The file should be closed forthwith bearing in mind that it was a 1999 file. But, in an attempt to write a speaking judgment, I must not stop here. I must proceed further and I have this to say.

A fact which is formally admitted ceases to be in issue. Any party who makes a formal admission and such admission is generally conclusive for purposes of the proceedings would certainly save his opponent the trouble, time and expense of proving the fact in issue. This was what had happened here. The defendants had admitted to the amount owing to the plaintiff. I must categorically say that the three letters of admissions as to the amount owing to the plaintiff by the defendants constituted open letters or letters not based on "without prejudice" basis. The three letters did not carry the "without prejudice" labels and according to the case of *Ted Bates (M) Sdn. Bhd. v. Balbir Singh Jhol*l [1979] 2 MLJ 257, FC, that the letter which was not headed "without prejudice" was not made on the basis of without prejudice. This meant that the defendants here had admitted to their liability and thus it would be a fit and proper case for summary judgment. The Federal Court in Ted Bates was also of the view that the contents of the defendant's letter in appealing for an extension of time to repay the sum should be considered as not been written or made on the basis of without prejudice. Lee Hun Hoe C.J. (Borneo) who delivered the decision of the Federal Court in Ted Bates aptly said at p. 258 of the judgment:

> The learned judge considered that that letter should have been regarded as written without prejudice. With respect, we think he is wrong. This has no application to a case where a man says he owes another a certain sum but merely asks for time to repay the sum. The letter was not even headed without prejudice. How could a letter written in such a situation be said to be written under prejudice. The question of prejudice has no application unless a person is in dispute or negotiation with another at the time.

This very principle was also adopted by Abdul Aziz Mohamad J (now JCA) in *Prodeal Sdn Bhd v. Kelimis Jaya Sdn. Bhd* [1999] 3 CLJ 409 and there his Lordship held that communication regarding a claim that was not disputed cannot be regarded as privilege. In *Lien Chong Credit & Leasing Sdn Bhd v. Sri Saga Holdings Sdn Bhd & Ors* [1997] 4 CLJ 168 CA, the Court of Appeal was of the opinion that the letter of admission by the defendant to the sum owed, like the facts of the present appeal, constituted a plain and obvious case for summary judgment.

In my considered view, in the context of the present appeal, it was rather obvious that the defendants have no defence on the merits against the plaintiff's claim.

The Defendants Are Estopped From Raising The Issue Of Mitigation Because They Have Already Made Clear Of Their Intention To Continue Using The said Goods

The first defendant's letters to the plaintiff dated 28 October 1999, 16 December 1999 and 24 December 1999 speak volumes. These three letters showed that the defendants have evinced an intention to continue using the said goods and categorically requested for the re-structuring of the monthly repayments. That being the case the defendants must be estopped from raising the issue that the plaintiff had failed to repossess the said goods when the defendants themselves have no intention of returning the said goods and wanted to use the said goods. In such a situation, the defendants ought not to be allowed "to blow hot and cold" at the same time considering the fact that the defendants themselves have not shown any intention of returning the said goods and were desirous of using them. The fact of the matter was this. That the said goods were not repossessed by the plaintiff and it did not, in any way, prejudiced the defendants at all. In reality, the defendants continued to use the said goods for their business activities.

The doctrine of estoppel is a wholesome rule. It is a rule entrenched in the English common law. Equity merely supplements the rule. It precludes a man from denying the existence of a state of affairs which he has previously asserted by words or conduct. Estoppel in pais (by words or conduct) has grown by leaps and bounds. The rule has always been that there would be estoppel where by words or conduct there had been a representation of existing facts (*Jorden v. Money* [1854] 5 H.L.C. 185; *Maddison v. Alderson* [1883] 8 App. Cas. 467; and *Neville v. Wilkinson* [1782] 1 Bro. C.C. 543) and not of law (*Territorial and Auxiliary Forces Association of the County of London v. Nichols* [1949] 1 K.B. 35; *Kai Nam v. Ma Kam Chan* [1956] A.C. 358; and *Tomlin v. Reid* [1963] E.G.D. 338) which was intended to be acted upon and was in fact acted upon to his prejudice by the person to whom it was made (*Canadian Pacific Ry. v. R.* [1931] A.C. 414 at 429; *Pickard v. Sears* [1837] 6 Ad. & E. 469 at 474; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* [1873] L.R. 6 H.L. 352 at 360; and *Dean v. Bruce* [1952] 1 K.B. 11). The maker of the representation cannot renege against the person so acting that the facts are other than he has represented them to be.

Applying the law as enunciated above, the defendants would certainly be estopped from denying what they had conveyed in the three letters. It was as simple as that. As a rule of evidence, estoppel would shackle the defendants to the ground (*Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha* [1935] L.R. 62 Ind. App. 100 at 108; and *Simmons v. Rose* [1862] 31 Beav. 1 at 7).

The Issue Of Responsibility Or The Duty To Reduce The Damages Or The Issue Of Mitigation Did Not Exist At All Because The said Goods Are Not Subject To The Hire-purchase Act 1967 (Act 212)

It was an undisputed fact that the said agreements were not caught under the Hire-Purchase Act 1967 (Act 212) bearing in mind that the said goods under hire purchase were various equipments, machines and forklift trucks. Section 1(2) of the Hire-Purchase Act 1967 (Act 212) enacts that:

> This Act shall apply throughout Malaysia and in respect only of hire-purchase agreements relating to the goods specified in the First Schedule.

The first schedule makes for an interesting reading material and I will now reproduce it *verbatim*:

FIRST SCHEDULE
Hire-Purchase Act 1967
(Section 1)
LIST OF GOODS

1. All consumer goods.
2. All vehicles, namely:
   (a) Invalid carriages;
   (b) Motor Cycles;
   (c) Motor Cars including taxi cabs and hire cars;
   (d) Goods Vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);
   (e) Buses, including stage buses.

So, it can readily be surmised that the hire purchase facilities granted to the first defendant were subject to the terms and conditions of the said agreements and not governed by the Hire-Purchase Act 1967 (Act 212). Now, according to the terms and conditions of the said agreements, the plaintiff has no duty to discharge by repossessing the said goods. There was no duty imposed on

the plaintiff to repossess the said goods and, consequently, the issue of repossessing the said goods and the issue of mitigation did not arise at all. Clause 15.3 of the said agreements state as follows:

> If the owner shall for any reason whatsoever be unable or unwilling to resume possession of the goods the owner shall be entitled at its option, *in lieu* of resuming possession of the goods, to recover from the hirer the unpaid balance of the hire purchase price less rebate (if any) plus all other sums payable under this Agreement.

This meant that by virtue of cl. 15.3 of the said agreements the plaintiff has a discretion whether to repossess the said goods or not. And if the plaintiff has no intention of repossessing the said goods, the plaintiff was entitled to recover from the hirer – referring to the first defendant, the unpaid balance of the sums owing. The plaintiff was also entitled to recover the unpaid sums from the defendants who were the guarantors.

Reference of cl. 15.2 of the said agreements should be made. There, it imposed the duty on the part of the first defendant to return the said goods when the said agreements were terminated. Clause 15.2 of the said agreements state as follows:

> Upon termination pursuant to sub-cl. 1 above the Hirer shall forthwith deliver up possession of the goods to the owner at the address specified herein or at such other address as the owner may specify in writing and the Hirer shall also return to the owner ... .

Legally speaking the law may be stated as follows. That the owner of the goods has no responsibility to reduce his damages especially when such goods are not subject to the Hire-Purchase Act 1967 (Act 212). In *Kesang Leasing Sdn Bhd. v. Longwood Sdn. Bhd. & Ors* [1988] 2 MLJ 328, the defendants there raised the issue of mitigation in an O. 14 proceeding and it was argued that the failure of the plaintiff there to repossess the goods meant that the plaintiff there had failed to reduce its damages. VC George J. (as he then was) relied on cl. 8 (iii) of the Hire Purchase Agreement (which is in pari materia to the plaintiff's cl. 15.3 of the said agreements here) and his Lordship rightly decided that there was no basis in equity or in law for raising mitigation as an issue for trial. Likewise here, the defendants being guarantors have no defences against the plaintiff's summary judgment application.

The same approach was again adopted by VC George J. (as he then was) in *Supreme Leasing Sdn Bhd v. Lee Gee & Ors* [1989] 1 MLJ 129 and, at p. 131 of the report, his Lordship had this to say:

> In view of cll 14-15 the question of the need to mitigate as suggested by counsel for the defendants does not arise.

> The argument is that the plaintiff should have repossessed the goods. The plaintiff say that they had tried to repossess but found the goods were hidden away. Neither the first nor the second defendants have come forward to deny this nor have they stated what has happened to the goods. The eighth defendant does deny that he had conspired with the first and second defendants to have the goods hidden away. However, the whereabouts of the goods is not disclosed.
>
> It seems to me that in the face of cl. 14, the hirers not having delivered the goods and being silent about the whereabouts of the goods, the stance taken by the defendants that they have a complaint that the plaintiff has not mitigated the damages is cocking a snook at the plaintiff and perhaps even at the court.

The judgments of VC George J. (as he then was) in the two cases cited above showed that the duty should be placed on the first defendant, as hirer, to return the said goods when demanded by the plaintiff in the letters of termination and demand. And that the defendants were not entitled to raise the issue of mitigation because they have not taken any steps to return the said goods to the plaintiff and that the defendants have kept quiet as to the location of the said goods when demanded by the plaintiff. Even the court of appeal in Singapore in the case of *Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd.* [1993] 3 SLR 662 dutifully followed the principle of law as enunciated by VC George J. (as he then was) in the Supreme Leasing case and held that the issue of mitigation did not arise because of the termination clause.

The defendants relied heavily on the case of *Kabatasan Timber Extraction Co. v. Chong Fah Shing* [1969] 2 MLJ 6, a decision of the Federal Court with a coram of Azmi L.P., Ismail Khan C.J. (Borneo) and MacIntyre F.J., in order to drive home the point that the plaintiff had a duty to mitigate its losses and damages. With respect, the case of *Kabatasan* concerned the duty to mitigate in general and it applied to a claim for damages but not to a claim for debt. Factually speaking too, the facts in *Kabatasan* are poles apart from the present appeal. In *Kabatasan*, the appellants there had entered into a contract with the respondent to supply timber to the respondent. The respondent claimed damages from the appellants for breach of contract when the appellants failed to deliver part of the timber to the respondent. The Federal Court held that the respondent had a general duty to reduce the damages suffered by them by taking reasonable steps to mitigate the damage by collecting the timber left a few hundred feet away from the sawmill and not buying logs from elsewhere. Here, before me, the plaintiff's claim against the defendants was based on a debt under the various hire purchase agreements and not based on damages for breach of contract by the defendants. It is trite law that there

is no duty imposed on the plaintiff to reduce a debt. Indeed that is the position of the law and it is set out in *Halsbury's Laws of England*, fourth edn, vol. 9 at p. 382 at para. 554 where it states as follows:

> Furthermore, the duty to mitigate has no application to claims for debt so that if the innocent party can fully perform his side of the agreement he may do so and sue for the agreed sum rather than damages; ...

Here, before me, the plaintiff had advanced a sum of money in order to finance the hire purchase of the said goods by the first defendant. The latter failed to settle the monthly instalments to the plaintiff and, consequently, the first defendant was considered to have repudiated the said agreements and, in which event, the plaintiff had proceeded to terminate the said agreements. Strictly speaking, it was a claim against all the defendants based on the hire purchase facilities granted by the plaintiff to the first defendant. It was a claim for the debt coupled with the interest. It was not a claim for damages for breach of contract but rather it was, pure and simple, a claim for the debt under the said agreements. Seen in this context, the reliance by the defendants on the case of Kabatasan was certainly misplaced.

Going on an uphill task, the defendants relied on cases decided in the context of leasing agreements. Cases like *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127; and *Sabah Finance Berhad v. UMW (East Malaysia) Sdn. Bhd.* [1991] 2 CLJ 1013 were relied upon. But, with respect, these two cases were not relevant to the plaintiff's claim nor would it shed light on the defendants' defence. These two cases were based on leasing agreements and it is now too well known that a leasing agreement can never be equated nor put on the same pedestal as the hire purchase agreement. Mr. Wong Kim Fatt, a former Judicial Commissioner, wrote an excellent article entitled "*Equipment Leasing in Malaysia: Some Legal Aspects And Problems"* reported in the Malayan Law Journal *vide* (1981) 1 MLJ X111 and, at pp. XV to XVI, this was what he wrote:

> As can be seen from the above statutory definitions, the common factor in a hire-purchase agreement is that the hirer has the option or right to buy the goods but is not obliged to do so. There is the element of sale in a hire-purchase agreement. In a lease, however, the element of sale does not arise at all and the ownership and title of the leased equipment remain vested with the lessor throughout the lease. The lessee, while enjoying the possession and use of the equipment, shall have no right or option to acquire ownership and title. In a hire-purchase agreement, the hirer has interest in the equipment hired and, if he pays the instalments punctually and observes the terms and conditions of the agreement, will at some point of time in the future become the legal owner of the goods.

I gratefully adopt what Mr. Wong Kim Fatt had said in that excellent article of his to the present appeal at hand. It is now crystal clear that the ownership of the goods leased under a leasing agreement will remain vested with the lessor or financier at the end of the contract unlike the hire purchase agreement where the ownership of the goods under hire will at some point of time in the near future become the ownership of the hirer if the hirer had paid all the monthly instalments. Put differently, there exists an option to purchase under the hire purchase agreement; and it would make sense for the lessor or financier in a leasing agreement to be under a duty to repossess the goods because ownership of the goods remain vested with the lessor or financier at the end of the contract.

So, again to put it differently, the law on hire purchase applies only to contracts of hire conferring an option to purchase (*Helby v. Matthews* [1895] AC 471, H.L.; and *Re Rankin, Rankin v. Shiliday* [1927] N1 162, C.A). In reality such a contract is a contract to purchase chattels by instalments subject to the overriding condition that the property in them is not to pass until all the instalments have been paid in full (*Lee v. Butler* [1893] 2 QB 318. C.A.; and *Hewison v. Ricketts* [1894] 71 LT 191).

Next, the defendants relied on the case of *Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor.* [1987] 2 MLJ 266 and argued that the plaintiff should mitigate its losses and take possession of the said goods. But, with respect, Hong Leong Finance Berhad was a case under the Hire-Purchase Act 1967 (Revised 1978) where there are provisions in the said Act for statutory notices to be given for taking possession of the goods. Whereas in the present appeal, the said goods were governed by and subjected to the said agreements - comprising of all the (42) hire purchase agreements, and the parties must therefore be bound within the four walls of the said agreements. It is for this reason that the case of Hong Leong Finance Berhad are distinguishable from the facts of the present appeal.

The case of *Tengku Farid Bin Tunku Hussain & Ors. v. United Asian Bank Berhad* [1985] 2 MLJ 199 SC, can also be distinguished. There the Supreme Court was concerned with lands that were charged as security for the loan and those lands were sold to several purchasers who have equities thereto and the Supreme Court ruled that it should protect the purchasers as they were the innocent ones.

The sum total of it all is this. Any reliance on any authority will not be blindly accepted by this court as the gospel truth. No two cases are alike. The facts of this appeal cannot be said to be akin to those authorities relied upon by the defendants.

Having admitted to the amount owing, what was there left for the defendants to do? There was nothing that the defendants could do except to accept that summary judgment should be ordered against them. That would be the inevitable.

The plaintiff here was entitled to obtain summary judgment without trial. There was no *bona fide* defence nor was there an issue against the claim which ought to be tried (*Roberts v. Plant* [1895] IQB 597, C.A.; *Robinson & Co. v. Lynes* [1894] 2 QB 577; *Dane v. Mortgage Ins. Corpn.* [1894] 1 QB 54, C.A.; *Nassau Steam Press v. Tyler* [1894] 70 L.T. 376; and *Edward v. Davies* [1888] 6 T.L.R. 385, C.A.). According to Jessel M.R. in *Anglo-Italian Bank v. Wells (and Davies)* [1878] 38 L.T. at p. 20:

> When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.

This was precisely what had happened in this appeal. It was my duty to allow the appeal in encl. 10 with costs and to give judgment to the plaintiff forthwith. I did just that.

Late Interest Charges And Whether The Various Late Interest Charges Amount To A Penalty Clause

Clause 10 of the said agreements merit reproduction and it is worded in this way:

> **Late charges**
>
> The hirer shall pay to the owner interest on any monies payable under this agreement which may from time to time become overdue from the hirer at the rate set out in the schedule hereto provided that the owner may, in its absolute discretion from time to time vary the said rate. Interest on overdue payments shall accrue from day to day … .

The plaintiff vehemently denied that the late interest charges amount to a penalty clause. According to the plaintiff, the defendants did not adduce evidence that that was the case in their affidavits. The stand of the plaintiff was quite simple. That the said agreements contained terms and conditions that the plaintiff was and is entitled to late interest charges. It would be ideal, at this juncture, to refer to the case of *Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries Bhd* [1989] 3 MLJ 246 where the High Court criticised the affidavit affirmed by the defendants there which did not condescend into particulars as to how or why the interests claimed were said to be without basis. The same would equally be true in regard to the affidavits of the defendants here.

The plaintiff further submitted that the defendants have not proven that the interests charged were excessive in nature or that it was never agreed upon. It must be borne in mind that by virtue of the said agreements the plaintiff was and is entitled to charge late interest charges. In the words of Siti Norma Yaakob JCA (now Chief Judge of Malaya) in *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 CA, 358:

> To bring that increased or penalty clause within the ambit of s. 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged.

Now, applying what her Ladyship had said in Pusat Bandar Damansara Sdn Bhd, it would be appropriate to say that the parties have agreed that the plaintiff was and is entitled to charge late interest charges and, consequently, it was not open to the defendants to raise an objection to the very idea which they had agreed upon.

Conclusion

For the varied reasons as adumbrated above, I allowed the plaintiff's appeal in encl. 10 with costs. I too ordered that the file to be closed bearing in mind that it was a 1999 file.